STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 2, 2013
v	No. 308945 Kent Circuit Court
GREGORY MICHAEL MANN, Defendant-Appellant.	LC No. 11-005642-FH

Before: FITZGERALD, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

A jury convicted defendant of two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a), and the trial court sentenced him as a fourth-offense felony offender to concurrent prison terms of 10 to 30 years. Defendant appeals as of right. We affirm.

T.W., the daughter of defendant's former girlfriend, testified that defendant twice engaged in sexual contact with her when she was 10 or 11 years old. On one occasion, defendant made her give him a "hand job." On the other occasion, defendant touched her vagina. Two others witnesses, L.M., defendant's daughter, and K.M., defendant's stepdaughter, testified that defendant engaged in sexual contact or penetration with them.

Defendant first argues that he was denied his constitutional right to notice of the charges against him when the information alleged that the two instances of sexual contact with T.W. occurred in a three-year period. According to defendant, because he was incarcerated for extended periods of time during the three years, he might have been able to provide an alibi defense had a more specific time period been given. We review this unpreserved claim of constitutional error for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

"A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence[.]" *In re Oliver*, 333 US 257, 273; 68 S Ct 499; 92 L Ed 2d 682 (1948). "A defendant's right to adequate notice of the charges against the defendant stems from the Sixth Amendment, as applied to the states through the Due Process Clause of the Fourteenth Amendment." *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998). "To the extent possible, the information should specify the time and place of the alleged offense." MCR 6.112(D). "The indictment or information shall contain . . . [t]he time of the offense as near as may be. No variance as to time

shall be fatal unless time is of the essence of the offense." MCL 767.45(1)(b). An alibi defense does not make time of the essence. *People v Dobek*, 274 Mich App 58, 83; 732 NW2d 546 (2007). In determining whether an information is deficient because of a failure to provide a specific date, a court considers the following factors: "(1) the nature of the crime charged; (2) the victim's ability to specify a date; (3) the prosecutor's efforts to pinpoint a date; and (4) the prejudice of the defendant in preparing a defense." *People v Sabin*, 223 Mich App 530, 532; 566 NW2d 677 (1997), remanded in part on other grounds 459 Mich 924 (1998) (quotation omitted). "Where the facts demonstrate that the prosecutor has stated the date and time of the offense to the best of his or her knowledge after undertaking a reasonably thorough investigation, we would be disinclined to hold that an information . . . was deficient for failure to pinpoint a specific date." *People v Naugle*, 152 Mich App 227, 234; 393 NW2d 592 (1986).

The nature of the charged offenses involved criminal sexual conduct against a minor. "Time is not of the essence, nor is it a material element, in criminal sexual conduct cases involving a child victim." *Dobek*, 274 Mich App at 83. T.W. did not disclose the sexual contact right after it occurred; rather, she delayed in disclosing for several years. We have generally recognized that children who are victims of sexual abuse may have difficulty remembering the specific dates of the abuse. *Naugle*, 152 Mich App at 235 Moreover, although the prosecutor made no attempt at trial to determine specific dates or a more specific time period for the abuse, there is no indication on the record that the prosecutor did not undertake a reasonably thorough investigation to determine a more specific time period for the abuse before the information was filed. Under these circumstances, even though defendant may have been able to assert an alibi defense for a certain portion of the three-year period, there was no obvious or clear denial of defendant's constitutional right to notice of the charges against him. *Carines*, 460 Mich at 763.[1]

We also reject defendant's claim that defense counsel was ineffective for failing to object to the information. Even though defendant might have had an alibi for certain periods of the three-year period stated in the information, the record does not establish that any objection to the information would have obtained any relief for defendant. See *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998) (stating that counsel is not ineffective for failing to make a futile objection). The record contains no facts to suggest that the prosecutor did not undertake an investigation to determine a more specific time period for the charged offenses, and an information will generally not be deficient for failure to pinpoint a specific date where the facts demonstrate that the prosecutor stated the date of the offense to the best of his knowledge after undertaking a reasonably thorough investigation. *Naugle*, 152 Mich App at 234.

---

[1] Defendant's reliance on *Valentine v Konteh*, 395 F3d 626 (CA 6, 2005), and Justice KELLY's opinion dissenting from the order denying leave to appeal in *People v Gurk*, 477 Mich 883; 722 NW2d 213 (2006), is misplaced. The situation in *Valentine* that led to the Sixth Circuit's holding that the defendant was denied his constitutional right to notice of the charges and in *Gurk* that led to Justice KELLY's dissenting opinion—that the information (or indictment) and the testimony of the victim failed to make any distinctions between the charged acts—is not present in the present case. T.W. made distinctions between the two charged acts. Neither the Sixth Circuit nor Justice KELLY found an information (or indictment) deficient as it related to the dates of the charged offenses.

Defendant next argues that the admission of evidence that he engaged in sexual conduct with L.M. and K.M. denied him a fair trial. He argues that the evidence was not relevant, was not admissible under MRE 404(b) or MCL 768.27a, and was unfairly prejudicial under MRE 403. We review this unpreserved claim of evidentiary error for plain error affecting defendant's substantial rights. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003).

Evidence of defendant's sexual conduct with L.M. and K.M. was relevant. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. "[A] defendant's character and propensity to commit the charged offense is highly relevant because an individual with a substantial criminal history is more likely to have committed a crime than is an individual free of past criminal activity." *People v Watkins*, 491 Mich 450, 468; 818 NW2d 296 (2012) (quotation omitted). Accordingly, evidence that defendant engaged in sexual conduct with L.M. and K.M. had a tendency to make it more probable that defendant engaged in sexual contact with T.W. MRE 401.

MCL 768.27a(1) provides:

> (1) Notwithstanding [MCL 768.27], in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered.

MCL 768.27a(1) permits the admission of evidence that a defendant committed another listed offense to prove the defendant's character and propensity to commit the charged crime. *Watkins*, 491 Mich at 470. The statutes conflicts with MRE 404(b), but because MCL 768.27a is a valid enactment of substantive law, it prevails over the rule of evidence. *Id.* at 475.

There is no dispute that MCL 768.27a applies to the present case. However, defendant claims that, because the prosecutor failed to give the required notice, evidence of his sexual conduct with L.M. and K.M. was not admissible under MCL 768.27a. However, nothing in the language of MCL 768.27a requires that the prosecuting attorney disclose the evidence that he intends to offer under the statute in a written notice filed with the trial court. We may not read such a requirement into the statute. See *People v Waltonen*, 272 Mich App 678, 685; 728 NW2d 881 (2006). The language of MCL 768.27a simply required that the prosecutor disclose evidence of defendant's sexual conduct with L.M. and K.M. to defendant at least 15 days before trial was scheduled to commence. And, we note that both L.M. and K.M. were listed as witnesses on the information. There is nothing in the record to indicate that the prosecutor failed to comply with this mandatory duty. Accordingly, defendant's argument is without merit.

Evidence admissible under MCL 768.27a remains subject to the balancing test of MRE 403. *Watkins*, 491 Mich at 481, 486. Under MRE 403, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the

issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." In applying the MRE 403 balancing test to evidence admissible under MCL 768.27a, a court must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect. *Watkins*, 491 Mich at 487. Here, defendant's conduct with L.M. and K.M. was similar to the charged conduct: defendant stood in a parental or semi-parental role to each of the three victims and engaged in sexual penetration or contact with each one. In addition, the other acts evidence was "highly relevant" because of the propensity inference and because the evidence supported T.W.'s credibility. *Id.* at 470, 491. Under these circumstances, the prejudicial value of the other acts evidence did not clearly or obviously substantially outweigh the evidence's probative value. *Carines*, 460 Mich at 763. Accordingly, there was no plain error in the admission of the evidence of defendant's sexual conduct with L.M. and K.M. under MCL 768.27a. *Coy*, 258 Mich App at 12.[2]

We reject defendant's claim that defense counsel was ineffective for failing to object to the evidence of defendant's sexual conduct with L.M. and K.M. Because the evidence was admissible under MCL 768.27a and was not excluded by MRE 403, any objection by defense counsel would have been meritless. Counsel is not ineffective for failing to make a futile objection. *Fike*, 228 Mich App at 182.

Defendant additionally argues that he was denied a fair trial by the admission of Paul Quint's testimony that defendant admitted that he engaged in sexual relations with his 13-year-old stepdaughter. According to defendant, Quint's testimony was irrelevant and highly prejudicial because his admission could not be linked to any of defendant's three victims. Because this ground was not the basis for defendant's objection to Quint's testimony below, the issue is unpreserved. See *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001) ("To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal."). We review this unpreserved evidentiary claim of error for plain error affecting defendant's substantial rights. *Coy*, 258 Mich App at 12.

Contrary to defendant's assertion, his admission to Quint could be linked to one of the three victims: K.M., who was defendant's stepdaughter. Further, the credibility of a witness is a material issue. See *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Quint's testimony regarding defendant's admission was relevant because it boosted the credibility of K.M. Quint's testimony had a tendency to make it more probable that K.M. was testifying truthfully. MRE 401. Accordingly, because defendant's admission to Quint could be linked to K.M., and because the admission boosted the credibility of K.M., there was no plain error in the admission of Quint's testimony. *Coy*, 258 Mich App at 12.

Defendant also argues that he was denied a fair trial by the testimony of K.M.'s mother that he was on tether and that he beat K.M. We review this unpreserved claim of evidentiary error for plain error affecting defendant's substantial rights. *Coy*, 258 Mich App at 12.

---

[2] Because of this conclusion, we need not address whether the evidence was admissible under MRE 404(b). *Watkins*, 491 Mich at 476-477.

Defendant fails to acknowledge that the allegedly improper testimony was given in response to questions asked by him. "[A]n appellant may not benefit from an alleged error that the appellant contributed to by plan or negligence." *People v Witherspoon*, 257 Mich App 329, 333; 670 NW2d 434 (2003). But, to the extent that the testimony was unresponsive and could be considered plainly improper, the testimony did not affect defendant's substantial rights. *Carines*, 460 Mich at 763. Evidence of defendant's character to commit crimes had already been made known to the jury through the testimony of L.M. and K.M. Thus, the brief references to defendant's tether and his act of beating K.M., did not affect the outcome of defendant's trial. *Id.*

We reject defendant's claim that defense counsel was ineffective for failing to object to the now challenged testimony, to request a curative instruction, or to move for a mistrial. "Certainly there are times when it is better not to object and draw attention to an improper comment," *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995), and defense counsel may have reasonably believed that this was one of those situations. In addition, "[a] trial court should only grant a mistrial when the prejudicial effect of the error cannot be removed in any other way." *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008). Instructions are presumed to cure most errors. *Id.* Defendant makes no argument that any prejudice resulting from the allegedly improper testimony could not have been cured by instructions. Accordingly, defendant fails to establish that a motion for a mistrial would have been granted. Counsel was not ineffective for failing to make a futile motion. *Fike*, 228 Mich App at 182.

Finally, defendant next argues that he was denied a fair trial by improper arguments by the prosecutor during closing argument. We review unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

Defendant claims that the prosecutor denigrated the defense when the prosecutor argued that defense counsel was throwing out "red herrings" and "stuff" against the wall. A prosecutor may not personally attack defense counsel. *People v Likine*, 288 Mich App 648, 659; 794 NW2d 85 (2010), reversed in part on other grounds 492 Mich 367 (2012). Similarly, a prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury. *Id.* An otherwise improper remark does not require reversal if it was made in response to defense counsel's arguments. *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001). The prosecutor's remark that "there's some effort throughout this trial . . . to get you off on different tangents and to get you on throwing out some red herrings" cannot be said to have been in response to defense counsel's arguments. The remark was not made during rebuttal argument, but was made during the prosecutor's initial closing argument. See *People v Unger*, 278 Mich App 210, 238; 749 NW2d 272 (2008). Because the remark suggested that defense counsel was attempting to intentionally mislead the jury, the remark constituted plain error. *Ackerman*, 257 Mich App at 448. However, the remark did not affect the outcome of the proceedings. *Carines*, 460 Mich at 763. The prosecutor's remark was not overly prejudicial. In addition, the jury was instructed that the lawyers' statements and arguments were not evidence and that it should only accept things that the lawyers said that were supported by the evidence or by its common sense and general knowledge. A jury is presumed to follow its instructions, and instructions are presumed to cure most errors. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

With respect to the prosecutor's "red herring" remarks in closing rebuttal argument, we find no plain error. The prosecutor's remarks were a response to defendant's arguments that the prosecutor had not proven the charged crimes beyond a reasonable doubt. Accordingly, the remarks were not a personal attack on defense counsel. *Likine*, 288 Mich App at 659.[3]

Defendant also claims that the prosecutor shifted the burden of proof and commented on his right not to testify when he argued that Quint's testimony was uncontroverted. A prosecutor may not shift the burden of proof to the defendant. *People v Fyda*, 288 Mich App 446, 463-464; 793 NW2d 712 (2010). A prosecutor shifts the burden of proof when he argues that the defendant must prove something or present a reasonable explanation for damaging evidence. *Id.* A prosecutor may not comment on a defendant's failure to testify. *People v Guenther*, 188 Mich App 174, 177; 469 NW2d 59 (1991). This rule is an important corollary to a defendant's Fifth Amendment right against self-incrimination. *Id.* Here, no person other than defendant could have provided testimony that disputed Quint's testimony, but our case law supports that a prosecutor's argument that the evidence was uncontroverted is not an improper comment on the defendant's right not to testify even if the defendant was the only person who could have provided contradictory testimony. See *Fyda*, 288 Mich App at 464; *Guenther*, 188 Mich App at 177. Based on these cases, the prosecutor's argument that Quint's testimony was uncontroverted was not clearly or obviously improper. *Carines*, 460 Mich at 763.[4]

Finally, we reject defendant's claim that defense counsel was ineffective for failing to object to the prosecutor's arguments. To the extent that the prosecutor's arguments were proper, defense counsel was not ineffective for failing to object. Counsel is not ineffective for failing to make a futile objection. *Fike*, 228 Mich App at 182. To the extent that the prosecutor's arguments were improper, defendant cannot show that, but for counsel's failure to object, there is a reasonable probability that the result of the proceedings would have been different. See *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). The trial court's instructions cured any prejudice that defendant might have suffered. *Abraham*, 256 Mich App at 279.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell

---

[3] Even if the remarks were improper, the trial court's instructions cured any prejudice suffered by defendant. *Abraham*, 256 Mich App at 279.

[4] Even if the prosecutor's argument was improper, the argument did not affect defendant's substantial rights. *Ackerman*, 257 Mich App at 448. The trial court instructed the jury that defendant was presumed innocent, that the prosecutor must prove each element of the charged crimes beyond a reasonable doubt, and that defendant was not required to prove his innocence or to do anything. The trial court's instructions cured any prejudice that defendant may have suffered. *Abraham*, 256 Mich App at 279.